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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF WYOMING,

Petitioner,

v.

UNITED STATES OF AMERICA, SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION, *et al.*,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Wyoming

BRIEF AMICUS CURIAE OF THE STATE OF CALIFORNIA AND THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA IN SUPPORT OF PETITIONER

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I. INTRODUCTION

The State of California and The Metropolitan Water District of Southern California ("Metropolitan") submit this brief amicus curiae in support of petitioner State of Wyoming.[1] Although California and Metropolitan also support the position set forth in the ami-

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[1] Letters of consent to Metropolitan from petitioner State of Wyoming and respondents the United States and the Northern Arapaho and Shoshone Indian Tribes are on file with the Clerk.

cus curiae brief of the States of Arizona, *et al.*, that it is inappropriate to apply the "practicably irrigable acreage" measurement standard to the needs of the Indian Tribes of the Wind River Indian Reservation, they are submitting this separate brief because of their unique perspectives on the issue before the Court.

California has a strong interet in seeing that the water needs of the Indian tribes within the State are determined by a reasonable quantification standard consistent with the economically efficient allocation of scarce water resources.

Metropolitan is a public agency of the State of California. It imports water to the Southern California coastal plain and wholesales that water to its twenty-seven member public agencies in an area stretching from Ventura County to the Mexican border and encompassing over one-half the population of the state. A major portion of Metropolitan's water is obtained from the Colorado River pursuant to contracts with the Secretary of the Interior for the storage and delivery of Colorado River water from Lake Mead issued pursuant to the Boulder Canyon Project Act (43 U.S.C. §617 *et seq*). California and Metropolitan were defendants in *Arizona v. California*, 373 U.S. 546 (1963) ("*Arizona I*"), and its sequel, *Arizona v. California*, 460 U.S. 605 (1983) ("*Arizona II*"). *Arizona I* established the "practicably irrigable acreage" standard as the measure of federally reserved water rights to the waters of the mainstream of the lower Colorado River for five Indian reservations—the Colorado River, Fort Mohave, Yuma, Chemehuevi and Cocopah. The Chemehuevi and portions of all but the Cocopah reservation are located in California. As a

result of the paramount priorities of the reservations and its junior priority vis-a-vis other California Colorado River contractors, uses by those four Indian reservations in California reduce the amount of California's Colorado River entitlement available to Metropolitan. Because Metropolitan is currently dependent for part of its Colorado River supply on unused Colorado River Basin water that may be subject to claims by Indian tribes, it has a vital interest in seeing a more reasonable measure of Indian water rights than "practicably irrigable acreage" applied to other reservations in the Basin.

Arizona II involved an effort by the United States and three of the mainstream Indian Tribes to increase their allocations under the decree in *Arizona I*. California, Metropolitan and the other State Party defendants successfully resisted that effort. As a result of the Court's decision in *Arizona II* with regard to certain boundary disputes on the Colorado River, Fort Mohave and Yuma reservations, California and Metropolitan have been attempting to obtain a judicial resolution of those disputes, which has been frustrated to date by the United States and the Tribes. One aspect of those disputes is currently pending before this Court. *California v. United States*, No. 87-1165 (argued November 28, 1988).

II. SUMMARY OF THE ARGUMENT

This Court's adoption in *Arizona I* of Special Master Simon H. Rifkind's report and recommendation ("Report") that the reserved water rights of the five mainstream Indian reservations should be measured by the practicably irrigable acreage on each reservation was a departure from the measure of the "reasonable needs of the Indians" originally employed in

Winters v. United States, 207 U.S. 564 (1908), and applied for 55 years by other federal courts. The measurement issue was not fully developed by the parties or carefully considered by the Court in *Arizona I* because of the magnitude of the other dominant issues in that case. The primary objective for adopting the practicably irrigable acreage measure, *i.e.*, to provide certainty to (1) the Secretary of the Interior in delivering water to those reservations to be served under the Boulder Canyon Project Act and (2) the lower Colorado River mainstream contractors, has not been achieved. Unique circumstances produced the "practicably irrigable acreage" measure in *Arizona I*. However, it is unfair and unworkable and should not automatically be applied to the Wind River Indian Reservation or any other Indian reservations in the West.

III. ARGUMENT

A. Prior to *Arizona I* no court had measured the "reasonable needs of the Indians" by all practicably irrigable acreage on the reservation.

Before Special Master Rifkind in *Arizona I* the United States relied solely on four cases to support its claim that the measure of the water rights for the 25 Indian reservations in the Lower Colorado River Basin should be enough water to irrigate all of the practicably irrigable acreage on those reservations: *Winters, supra*; *Conrad Investment Co. v. United States*, 161 F. 829 (9th Cir. 1908); *Skeem v. United States*, 273 F. 93 (9th Cir. 1921); and *United States v. Ahtanum Irr. Dist.*, 236 F.2d 321 (9th Cir. 1956).[2]

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[2] Brief in Support of Proposed Findings of Fact and Conclusions Law of the United States of America (April 1, 1959) at 29.

In their briefs before the Special Master the California defendants (hereafter "California") demonstrated that those cases did not support the United States' claim, and showed that they had generally measured the Indians' needs by providing enough water to irrigate the maximum amount of acreage with a history of actual irrigation.[3] Consequently, California proposed allocations to the mainstream reservations in California based on the maximum amount of acreage historically irrigated on the reservations, either by Indians or non-Indians, except for the Yuma reservation for which it proposed the full magnitude of that reservation's entitlement under the state law appropriative water right under which it was being served.[4] It summarized its proposal as follows:[5]

> We do not ask a decree which would deprive any Indian or Indian reservation either of water which has been appropriated for an existing project, or water which is being used, even without proof of compliance with state law. On the other hand, we do not see in *Arizona v. California* an appropriate occasion to secure from an over-appropriated water supply, a decree which provides a

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[3] Brief of the California Defendants To Accompany Their Proposed Findings of Fact and Conclusions of Law (April 1, 1959) ("Calif. Opening Brief") at 191-95; Response of the California Defendants to Brief in Support of Proposed Findings of Fact and Conclusions of Law of the United States of America (June 11, 1959) ("Calif. Response") at 115-17.

[4] California Proposed Findings of Fact and Conclusions of Law (April 1, 1959) ("Calif. Findings") at Calif. Finding 13D:104, p. XIII-18; and Calif. Conclusion 13D:296, p. XIII-29.

[5] Calif. Opening Brief at 195.

> water right for every Indian acre that a Government soil classification analysis undertaken for purposes of this case has discovered to be irrigable. Water is too scarce and too precious to be set aside for anyone—Indian or non-Indian—on a when, as, and if needed basis.

B. The issue of the measure of the *Winters* rights for the Lower Colorado River mainstream Indian reservations was not fully presented or carefully considered in *Arizona I* because of the magnitude of the other issues in the case.

The Special Master's Report in *Arizona I* advised the Court that its "summary description of the various controversies involved in this case indicates that the action is far from being the traditional equitable apportionment suit" and that it did not present "a single, relatively narrow issue", but rather "a complex of interstate lawsuits." (Report at 6).

The trial before the Special Master in *Arizona I* lasted over two years, during which 106 witnesses were heard whose testimony produced a transcript of some 22,500 pages and thousands of exhibits. In addition, depositions of 234 witnesses in the Arizona-New Mexico dispute on the Gila River produced a transcript of 3742 pages. Based on that record the five Lower Colorado River Basin States of Arizona, California, Nevada, New Mexico and Utah submitted some 3862 pages of proposed findings of fact, conclusions of law and supporting briefs on a wide variety of issues. (Report at 3). However, of the over 2000 pages of briefs, only about 100 were devoted to the United States' claims of *Winters* reserved water rights for the Lower Basin reservations and a small

fraction of that amount to the measure of any such rights.

In his Draft Report of May 5, 1960 ("D. Rep."), the Special Master held that it was unnecessary "to adjudicate the rights or priorities of Indian Reservations diverting water from the Lower Basin tributaries, except for the Gila River." (D. Rep. at 222). With respect to the Gila River System Indian reservations, the Special Master also found it unnecessary to adjudicate any rights on wholly intrastate tributaries of the Gila River. (*Id.* at 294). As to its interstate tributaries, the United States claimed rights on only three reservations on the Gila River proper—the Gila River, San Carlos and Gila Bend reservations. The United States conceded that the rights of the Gila River and San Carlos reservations were governed by the long standing "Gila Decree". As to the Gila Bend reservation, the Special Master concluded that because of its geographical location and an already adequate supply from groundwater sources, "no reasonable purpose can be served in an equitable apportionment by allocating water to the Reservation at the expense of present New Mexico uses." (*Id.* at 295).

However, the Special Master found it necessary to adjudicate the mainstream reservation rights "in order that the Secretary may know how much water he may release [from Hoover Dam and the mainstream works below] for consumption on each Indian Reservation" and because the Indian claims were "of such great magnitude that failure to adjudicate them would leave a cloud on the legal availability of substantial amounts of mainstream water for use by non-Indian projects." (*Id.* at 223). He then sustained the

United States' claims as to the source and measure of their water rights. (*Id.* at 221-33). Having found the requisite federal power to reserve water for the reservations and the implied Congressional and executive intent to do so (*id.* at 224-27), the Special Master also concluded that the amount of water reserved was not limited to the needs of the Indian population resident on a reservation when it was created, nor to the acreage being irrigated at the time of its creation, but that it looked to the Indians' future requirements. (*Id.* at 227-28). Finally, he determined that such "future needs of the Indians" should encompass "sufficient water to irrigate all of the practicably irrigable lands in a Reservation and to supply related stock and domestic uses" (hereafter "PIA"). (*Id.* at 229).

With respect to California's and Arizona's arguments that no prior cases had so defined the reasonable future needs of an Indian reservation in such an expansive fashion, the Special Master declined to utilize the approach of the earlier cases (*id.* at 231-32, emphasis added):

> Furthermore, whether it is ever possible accurately to predict the future needs of an Indian Reservation, it is clearly not possible in this case where the energy of the parties has been devoted to a great many complex and important issues quite apart from those relating to the Indians. *Whatever might be possible in a case involving solely the issue of the reserved rights of a single Indian Reservation*, it would not be possible to predict future Reservation needs in this litigation.

He justified his selection of the PIA measure on the need "to provide certainty for both the United States and non-Indian users" (*id.* at 232), which had been the sole reason offered for adjudicating the mainstream reservation rights at all. It was the Special Master's view that the PIA measure would eliminate the uncertainty which he believed would flow from adopting "an open-end decree" under which "each Reservation may divert at any particular time all the water reasonably necessary for its agricultural and related uses as against those who appropriated water subsequent to its establishment." (*Id.* at 230-31). The Special Master's concern was that "such a limitless claim would place all junior water rights in jeopardy of the uncertain and the unknowable." (*Id.*)

Only California and Arizona challenged the Special Master's Indian water rights' recommendations in their written comments and oral argument on the draft report. (Report at 3, note 11a). The Special Master conceded during oral argument that his mainstream Indian reservation recommendations went beyond *Winters* and its progeny up to that time.[6] However, the only significant change which the Special Master made in the draft report's treatment of Indian water rights was to add an introductory state-

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[6] MR. WILMER [Arizona counsel]: . . . We believe that Winters is misread, your Honor. We believe that the implications of the Winters case are not as broad or as far reaching as your Honor has carried them in this particular . . .

THE MASTER: I am inclined to agree with you. Like all things, I think this is a branch on the tree. I think that is true. • • • All I can say is I think this is down the thread of the doctrine or stream as it is moving.

Tr. 22,960-61.

ment to that part of his report dealing with the measure of such rights stating that the issue was "sharply debated and many conflicting views have been advanced." (Compare D. Rep. at 229 with Report at 262). This addition suggests that the Special Master intended to emphasize the controversial nature of the PIA standard for the Court, since the rest of his decision on Indian water rights leaves no doubt that he felt that he was on very firm ground on the other elements of his recommendation.

Exceptions were filed by all parties to various portions of the Special Master's report. Neither Nevada nor Utah filed exceptions to his treatment of Indian claims, apparently because there are no Indian reservations in the Utah portion of the Lower Colorado River Basin and Nevada contains only a relatively small portion of the Fort Mojave Indian Reservation. New Mexico expressed its disagreement in principle with the Report's application of the *Winters* doctrine and its extension to other kinds of federal reservations, asserting that "application of these doctrines is generally contrary to the efficient development and use of the water resources of the arid West."[7] However, it did not take exception to the specific manner in which the implied reservation theory was applied to the equitable apportionment on the Gila River system inasmuch as it recognized an existing judicial decree and declined to disrupt existing uses in New Mexico for the benefit of the distant, downstream Gila Bend Reservation. (See page 7 *supra*.).

California and Arizona both excepted to the Report's treatment of Indian water rights. However,

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[7] New Mexico Exceptions (February 27, 1961) at 2.

California noted that it would not brief the issue because (1) the quantities of water in dispute in California were small and (2) all Indian uses were to be chargeable to the state where made.[8] Because the principal impact of the Indian allocations from the mainstream would therefore fall on Arizona and might jeopardize the permanent water supply for the Central Arizona Project which Arizona sought in its suit (Report at 30-31), California made the strategic choice to concentrate its efforts in challenging the interstate allocation recommended by the Special Master and not dilute them by mounting an attack on principle against the Indian allocations.

Arizona was thus left to wage a lone battle against the Special Master's application of the *Winters* doctrine, particularly his decision to measure the Indian rights by PIA. Without in any way intending to detract from the Arizona effort, and with perfect 20/20 hindsight, Arizona appears to have devoted an undue portion of its argument to the constitutional and intent issues underlying the Special Master's recommendation,[9] issues on which he appeared to be on strongest ground, rather than focusing on his PIA recommendation. Arizona's concession that "an open-end decree which would leave the reserved amount uncertain and subject to fluctuation is neither desirable nor necessary" was similarly unfortunate.[10]

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[8] California Exceptions (February 27, 1961) at 25. It also excepted to the Special Master's resolution of a disputed portion of the boundary of the Colorado River Indian Reservation in California. *Id.*

[9] Opening Brief for Arizona (May 22, 1961) at 121-53.

[10] *Id.* at 155.

In any event, the Indian water rights issues became submerged in the other major interstate issues presented to the Court. Of some 1469 pages of briefs presented to the Court, only 103 in the United States and Arizona briefs dealt with the Indian water rights issue. Of those pages, only 49 dealt with the PIA standard. Similarly, out of 16 hours of oral argument and 6 hours of reargument it appears that only 64 pages of the 858 pages of transcript dealt with Indian water rights issues and only 15 pages were directed to PIA. This limited treatment of PIA received a similar response in the Court's decision, which .s-posed of the PIA issue in a single short paragraph (373 U.S. at 600-01):

> We also agree with the Master's conclusion as to the quantity of water intended to be reserved. He found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations. Arizona, on the other hand, contends that the quantity of water reserved should be measured by the Indians' "reasonably foreseeable needs," which, in fact, means by the number of Indians. How many Indians there will be and what their future uses will be can only be guessed. We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage. The various acreages of irrigable land which the Master found to be on the

different reservations we find to be reasonable.

Consequently, the Court approved the Special Master's recommended allocation to the five mainstream reservations of 905,496 acre-feet of diversions for 135,636 acres of practicably irrigable acreage (Report at 350-51), even though the maximum annual irrigated acreage on those reservations had never exceeded 36,000 acres.[11]

The limited attention given by the parties and the Court to the PIA measure for the five Indian reservations in *Arizona I* should be contrasted with the extensive attention given to the issues of the nature and extent of federal reserved water rights for a single national monument in *Cappaert v. United States*, 426 U.S. 128 (1976), and a single national forest in *United States v. New Mexico*, 438 U.S. 696 (1978), both of which had substantially less impact on the affected States in terms of the "gallon-for-gallon" reduction[12] of the water supply legally available for their non-Indian water users than did the PIA decision.

C. The PIA measure has not produced the certainty on the lower Colorado River mainstream that it was intended to promote.

Although the PIA measure was adopted primarily because it would allegedly provide more certainty to the Secretary of the Interior and non-Indian water users on the lower Colorado River than would an open

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[11] Calif. Findings 4C:104, 4D:103, 13D:104, 14C:108, 18E:104 and 18F:104.

[12] *United States v. New Mexico*, 438 U.S. 696, 705 (1978).

end decree permitting a Tribe to expand its needs as they developed, it has not done so. Indeed the concept is fraught with inherent uncertainty. Whether lands are "practicably irrigable" depends basically on whether (1) soils are suitable for agriculture, (2) water can be applied in a technically feasible manner, and (3) the costs and revenues associated with the agricultural pursuit, if it is for other than subsistence, make it economically feasible. Not only are these elements subject to reasonable disagreement at any given point in time, but they are constantly in flux as a result of changing soil suitability standards, improving irrigation technology and practice, fluctuating economic conditions, and changing standards for determining the economic feasibility of water projects.

The foregoing uncertainty generated by adoption of the PIA measure in *Arizona I* is no better illustrated than by its own aftermath in *Arizona II*. Although the latter case involved important legal issues about the scope of the *Arizona I* decision, almost all of the seven months of trial, involving some 7300 pages of testimony and several hundred exhibits, were devoted to whether the so-called "boundary lands" and "omitted lands" at issue were "practicably irrigable". (Report of Special Master Elbert P. Tuttle (February 22, 1982) at 5-6.) Similarly, almost two-thirds (pages 89-277) of the Special Master's 315 page report was directed at trying to define and implement the PIA measurement standard. Adverting to the decision in *Arizona I*, Special Master Tuttle noted that "[t]he parties agree that neither the Special Master nor the Court defined the phrase 'practicably irrigable' " and that "many parties have presented different definitions of that phrase." (*Id.* at 93). After reviewing the

differing views of the parties and the proceedings before Special Master Rifkind, Special Master Tuttle concluded that the phrase "very nearly means 'economically feasible' ". (*Id.* at 94).

With that determination he embarked on a long odyssey into such disputes between the United States and the State Parties as whether any applicable benefit-cost analysis should include a profit margin on the benefit side of the equation (*id.* at 99-100), whether the moisture-holding capacity of certain "sandy lands" was high enough to qualify them as arable (*id.* at 126-32), what the "expected" crop yields and production costs on such lands might be (*id.* at 134-45), whether certain lands contained too much gravel and cobbles (large rocks) to be arable (*id.* at 145-58), and what the capital, indirect, operation and maintenance, and power costs of a hypothetical future irrigation system might be (*id.* at 165-80).

In addition to those disputes between the State Parties and the United States, the Tribes' independent claims presented additional issues as to the suitability of the cash crops which might be produced on the lands in question. The disputes centered on "the correctness of the prices and yields used by the Tribes' experts" with respect to hypothetical production of pistachios, almonds, figs and table grapes. (*Id.* at 197). The Special Master's task was made more difficult in this regard because only grapes had "a tangible history of production in the immediate vicinity of any of the Reservations, and even that history is not very extensive." (*Id.* at 197-98). That exercise consumed 40 pages of his report. (*Id.* at 198-239). One cannot review this part of the Special Master's report without a strong sense of the utter unreality and futility

associated with an attempt to predict the economic feasibility of future hypothetical Indian irrigation projects. However, the basis of the Court's decision in *Arizona II* made it unnecessary to address any of the thorny issues of economic feasibility. 460 U.S. at 640-41.

The PIA standard adopted in *Arizona I* has also presented great uncertainty by generating three major Indian reservation boundary disputes on the lower Colorado River. Before Special Master Rifkind in *Arizona I*, California pointed out that the United States' PIA proposal had engendered unnecessary boundary disputes with regard to the Fort Mohave and Colorado River reservations:[13]

> Unless the implied reservation which the United States would create for "the needs of the Indians" works in behalf of absentee Indians who have never manifested any need, intention, or ability to use water, or unless the water "appurtenant" to Indian land is measured in the absence of any such need or any plan to put water to use, the boundary disputes with the United States on the Colorado River and Fort Mohave reservations are wholly immaterial. They affect land which has no Indian population and no irrigation or other use of water by or on behalf of Indians. There is no occasion to decide these boundary questions except for the gratuitous injection by the United States into the collision between Arizona and California of the unrealistic contention that "irrigable" acreage is

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[13] Calif. Response at 127.

> the test of the quantum of water needed by Indians, existent or nonexistent. Either boundary dispute would present a major lawsuit in itself.

California's prophecy has been fulfilled, inasmuch as not only do the Fort Mojave and Colorado River reservation boundary disputes remain unresolved after 25 years, but a new boundary dispute has been generated on the Fort Yuma reservation, obviously as a result of the perceived opportunity for an increase in that reservation's *Arizona I* allocation as a result of the adoption of the PIA decision.[14] *Arizona II*, 460 U.S. at 628-41; *California v. United States*, U.S. Supreme Court No. 87-1165 (oral argument held November 28, 1988). Those three boundary disputes have generated substantial uncertainty for Metropolitan as it attempts to forecast the magnitude of the imminent shortages it faces and for which alternative supplies must be found. In a recent decision the California Water Resources Control Board recognized that Metropolitan had a substantial present need for additional supplies of water and noted that the full magnitude

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[14] In *Arizona I* the United States presented a claim for the Fort Yuma Reservation based on a boundary that neither California nor Arizona challenged. However, after *Arizona I* established that the reservation's right was to be measured by PIA, the Interior Department Solicitor subsequently overruled three prior Solicitor's opinions and redetermined the reservation boundary to increase its acreage by about 25,000 acres. The following day the Justice Department filed a motion with this Court to reopen the decree in *Arizona I* to increase the Fort Yuma Reservation allocation based on the newly added PIA, a claim that was ultimately rejected on procedural grounds in *Arizona II*. 460 U.S. at 632-33, 636.

of its shortage was uncertain because of possible increased uses by Indian tribes:[15]

> "As the result of wet conditions on the Colorado River since 1983, MWD has been able to divert close to the 1.3 million acre-foot capacity of its Colorado River aqueduct in each of the last five years. . . . Due to the development of the Central Arizona Project and other factors, however, the quantity of Colorado River water available for diversion by MWD on a dependable basis will be restricted to the quantity available under its fourth priority right of 550,000 acre-feet per annum. This quantity is reduced further by approximately 30,000 acre-feet per annum due to current levels of use by other holders of present perfected rights. *There is a possibility of additional reductions in the quantity of water available to MWD due to increased use by Indian tribes.* . . . The Central Arizona Project began deliveries in 1985 and is expected to utilize its full apportionment in about 1992. . . . Without the development of additional supplies, the record indicates that MWD faces a potential system-wide shortfall during dry periods of 560,000 acre-feet per annum by the year 2000, increasing to 980,000 acre-feet per annum by 2010."

Thus, as a practical matter the PIA standard has not eliminated uncertainty as hoped for by the Special

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[15] *In the Matter of Waste and Unreasonable Use of Water By Imperial Irrigation District* (September 7, 1988) at 10. (Emphasis added, record citations omitted).

Master. Metropolitan and other junior non-Indian users on the Lower Colorado River mainstream, such as the Central Arizona Water Conservation District which serves the burgeoning Phoenix and Tucson metropolitan areas, still face substantial uncertainty, inasmuch as the limited permanent water supply available from the Colorado River requires them to rely on the unused portions of the large senior allocations to the Indians. This reliance essentially is no different than if the Court had given the Tribes a firm allocation of enough water to supply their maximum historic uses (as California had argued before Special Master Rifkind) and then entered an open-end decree permitting the Tribes to increase those quantities if and when their needs developed. The "true" PIA on each reservation would then serve as a practical limit on future increased use because neither the Tribes nor their possible non-Indian lessees would irrigate reservation lands unless it was truly economically feasible to do so. Thus, *actual* Indian needs, government policies, and market factors supporting agricultural production necessary to support a "moderate standard of living"[16] for the Tribes would replace the kind of fruitless contest between soil specialists, agricultural economists and other experts as to the economic feasibility of *hypothetical* future agricultural development that took place in *Arizona II* and in the Big Horn River decision under review in this case.

Unfortunately, the merits of an open-end decree with a minimum firm allocation measured by maxi-

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[16] *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 686 (1979).

mum historic uses were not carefully considered in *Arizona I*. The Special Master raised *ex parte* and evaluated the possibility of a simple open-end decree only superficially. Neither the United States nor Arizona seriously addressed the implications of such an approach after California abandoned the chase, and the Court did not even mention, let alone evaluate it. Whether such an approach or other possible measurement standards might have adequately provided for the reasonable future needs of the mainstream Indian Tribes while minimizing curtailment of uses by existing and planned non-Indian projects remains unexplored.

IV. CONCLUSION

The PIA standard adopted by the Court in *Arizona I*, even though applied to only five of the 25 Indian reservations for which the United States asserted *Winters* claims in that case, broke new ground in the application of the *Winters* doctrine and was the most controversial aspect of the Special Master's Indian water rights recommendations. However, because it did not adversely impact Nevada, Utah and New Mexico, those States did not contest it. Although it did adversely affect California, the impact was minimal compared to the impact of the major interstate allocation recommendation of the Special Master, leading California to abandon active opposition to the Indian recommendations in briefs and oral argument before this Court. Consequently, Arizona shouldered the entire burden for the five States on this issue (in addition to concentrating its presentation on supporting the Special Master's recommended interstate allocation which was of critical importance to it) and did not focus its efforts on demonstrating the inva-

lidity and serious adverse impact of the PIA measure on it or the other western States.

The Special Master's questionable rationale for his departure from the established standards for measuring the reasonable needs of an Indian reservation with a *Winters* right was not subjected to adequate testing by the State Parties or this Court. The result was that the PIA issue was decided almost by default. The "certainty" objective that the Special Master and the Court sought to achieve has not been realized on the mainstream of the Lower Colorado River. Indeed the PIA standard has engendered uncertainty and the waste of resources in litigation over disputed reservation boundaries and overreaching by the United States and the tribes encouraged by the enticements of the PIA standard. The well-intentioned, but mistaken, rationale that produced the PIA standard on the mainstream of the Lower Colorado River in the unique circumstances of *Arizona I* should not be extended automatically to the Wind River Indian Reservation, or indeed to any other Indian reservations in the West. The Court should return to the approach to measuring *Winters* rights that had been applied for half a century before the Court abandoned it in *Arizona I* on the mainstream Indian reservations for reasons it felt necessary for proper administration of the Boulder Canyon Project Act.

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